STATE BAR OF CALIFORNIA ENVIRONMENTAL LAW SECTION
LAW STUDENT ENVIRONMENTAL NEGOTIATIONS
COMPETITION FACT PATTERN
2003

Michael Strassberg owned a 160 acre tract of land in southern California. In 1943, Strassberg leased the property to the McCabe Disposal Company to operate a solid waste landfill. McCabe Disposal Company operated several solid waste disposal facilities in southern California as well as operating a waste hauling business. McCabe Disposal operated the landfill on the Strassberg tract from 1943-1977. In 1977, Gritter Corporation purchased the assets of the McCabe Disposal Company, including all of its equipment, inventory and physical plants. Shortly after the sale, McCabe Corporation dissolved and distributed its assets to its shareholders. In the purchase agreement, the Gritter Corporation expressly stated it was not assuming the liabilities of McCabe. After the asset purchase, Gritter continued to operate the other landfills formerly owned by McCabe although it did not continue operations at the landfill on the Strassberg site.

In 1978, in response to complaints from area residents, Michael Strassberg placed a temporary soil cover on the landfill. In 1992, Michael Strassberg died, leaving his entire estate to his son, William. William Strassberg is the current owner of the property.

During the time of its operation, the landfill accepted approximately 3000 tons of waste. Because the landfill closed prior to 1980, it is not regulated under the Resource Conservation and Recovery Act (RCRA) ~~n~~or any State solid waste laws. The landfill is unsightly, rising 100 feet above ground surface. The landfill cap has partially eroded over time, exposing the waste. Other than occasionally restoring eroded areas of the cap, William Strassberg does not utilize the facility in any way and the parcel remains vacant.

The adjacent parcel is owned by Drabbino, Inc., a New Jersey corporation, which operates an automotive detailing facility. Drabbino purchased the parcel from Klein Corporation in February 2002. Klein Corporation operated a plating shop at the facility from 1994-1996. In 2001, Robert Klein, president of Klein Corporation, was convicted of illegally disposing of wastes from its plating operations. Based on evidence provided in the criminal trial, Klein disposed of approximately 250 gallons of spent plating solvents, primarily perchloroethylene (PCE) -into four unlined ponds on the parcel.

Prior to purchasing the property in 2002 Drabbino hired an environmental consultant to perform a Phase I assessment of the site. A Phase I assessment generally includes a review of publicly available documentation concerning the environmental condition of the site. Consistent with standard practice for Phase I assessments, the consultant inspected the site but did not take samples. The consultant-s report documented that liquid wastes appeared to be ponded in two areas and two other dry areas appeared to have been former disposal locations.

In July 2002, five months after it purchased the property, Drabbino removed the liquid waste present in two of the ponds and transported the waste to a permitted hazardous waste facility. After another month-s delay, it placed a chain link fence around the pit area and posted warning signs in English, although it was aware that most of the residents in the area are farm workers for whom English is a second language.

In 1997, the State Department of Toxic Substances Control (DTSC) began investigating groundwater contamination in the area of the two parcels. The landowner south of the Strassberg and Drabbino parcels (Ogilvie Farm) detected a strange taste and odor from the groundwater pumped from the well on his property. The State installed a series of monitoring wells in the area. Data from the wells revealed that the groundwater in the area was contaminated with the solvents trichloroethylene (TCE) and PCE, both widely used industrial solvents. The plume underlies parts of both the Strassberg tract and the Drabbino tract and extends onto adjacent agricultural properties.

The solvents were present in concentrations twenty times the Maximum Contaminant Level allowed under the Safe Drinking Water Act. The State investigation also revealed that the plume was migrating in a southeasterly direction toward a drinking water production well owned by the City of McKinley Falls.

DTSC also began investigating the ponds on the Drabbino parcel and the landfill on the Strassberg parcel. Sampling of the ponds revealed high concentrations of PCE as well as the heavy metals chromium and cadmium in surrounding soils. PCE and TCE have approximately the same toxicity and can be removed from the groundwater through the same technology. However, EPA is currently reassessing the toxicity of TCE. Preliminary indications are that TCE will be regarded as more toxic than previously thought. Treatment for heavy metals in soils employs different technologies than those used in remediation of solvents. The landfill is unlined and leaking. No records survive indicating the source of the waste. However, the statement of a former employee of the landfill indicates that the majority of the waste came from nearby McKinley Falls and consisted of both household and industrial waste. DTSC believes that both the landfill and the ponds are sources of co-mingled groundwater contamination.

In March 1998 and again in November 1998, the State sent information request letters to the Gritter Corporation. Gritter failed to respond. (Gritter has a long-history of non-cooperation with governmental agencies.) In February 1999, counsel for the California Attorney General=s
Office telephoned the General Counsel for Gritter Corporation. After researching the matter, the General Counsel informed the State that the information request letter had been located and that a response would be forthcoming. In June 1999, the Gritter Corporation responded to the information request letter, indicating among other things that it had no documentation indicating the sources of the waste disposed at the landfill.

The land to the south of the two parcels is agricultural. The land to the north is primarily residential, single and multi-family homes. The residents in the area are largely farm workers.

Statutory Background

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as the Superfund law, 42 U.S.C. 9601 et. seq. was passed in 1980. Its primary purpose was to provide a mechanism for the cleanup of abandoned waste sites such as the infamous Love Canal site in New York. The law is the product of harried, last minute negotiations and is generally criticized for its lack of clarity. The law has been amended a number of times, most notably the Superfund Amendments and Reauthorization Act of 1986 and the Small Business Liability Relief and Brownfields Revitalization Act, passed in 2002.

The Superfund law provides EPA and the states with unprecedented authority to recover cleanup costs. Liability under CERCLA is strict, joint and several, and retroactive. Therefore, a single defendant could be held liable for all costs of cleanup even though its actions were non-negligent and lawful and even if there are additional liable parties. With limited exceptions, CERCLA liability is imposed on the following four classes of parties: current owners and operators; owners and operators at the time of disposal; persons who arranged for treatment or disposal of hazardous substances at the facility (also known as Agenerators@); and persons who transported hazardous substances to the facility.

In addition to claims that can be brought by the regulators, CERCLA provides for a private cause of action between responsible parties. A potentially responsible party (PRP) who has expended more than its equitable share in cleaning up a site can sue other potentially responsible parties for contribution. The courts have provided guidance on determining the appropriate equitable allocation between responsible parties centered around the so-called AGore Factors@. These cases are also helpful in the context of settlements, providing the PRPs with guidance in dividing up responsibility for sites. The equitable factors to consider include:

1. Ability of the parties to demonstrate that their contribution to a discharge, release or disposal can be distinguished;

2. The amount of the hazardous waste involved;

3. The degree of toxicity of the hazardous waste involved;

4. The degree of involvement in generation, transportation, treatment, storage, disposal of the hazardous waste;

5. The degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the character of such hazardous waste; and

6. The degree of cooperation by the parties with Federal, State, local officials to prevent any harm to the public health or the environment

See Beazer East, Inc. v. The Mead Corp., 2000 U.S. Dist. LEXIS 4282 (W.D. Pa. Par. 7, 2000); Boeing Company v. Cascade Corp. 207 F.3d 1177 (9th Cir. 2000); Acushnet v. Mohasco Corp. 191 F. 3d 69 (1st Cir. 1999); Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298 (9th Cir. 1997).

Superfund cases proceed through a fairly standardized process. After an initial investigation, the State or EPA will determine whether long-term cleanup of a site is warranted. If EPA is the lead agency, it will add the site to the National Priorities List, a list of the nation=s worst hazardous waste sites. The State or EPA will publish its cleanup decision for the site, denominated a Record of Decision (ROD) in the case of EPA or Remedial Action Plan (RAP) where the State is the lead. Following the ROD or RAP, the agencies will generally initiate cleanup negotiations with the PRPs. In most cases, these negotiations result in an agreement requiring the PRPs to cleanup the site and to repay EPA and the State for governmental costs expended at the site. In some cases, the PRPs will pay money to the regulatory agencies and the agencies will perform the clean up. This approach is used in limited circumstances because private-sector cleanups can generally be performed for 10-15% less than publicly run projects. Under the federal statute and in some state programs, the regulatory agency can take past costs recovered and place them into a discrete Aspecial account@. Funds from the special account can then be utilized by the agency to fund future work at the site if necessary.

For a more detailed discussion of CERCLA, see WILLIAM RODGERS, ENVIRONMENTAL LAW (4 volume treatise).

There will be two separate rounds of negotiations during the morning portion of the competition. Round 1 will be a negotiation between the State and Gritter. Round 2 will be a negotiation between Drabbino and Gritter.

Round One: State and Gritter Negotiations, Common Facts.

The State is contemplating litigation to recover past and future costs under Superfund, specifically to recover the $10 million it has already spent in investigation costs and to get agreement from the parties to conduct the cleanup. Although the remedy has not yet been selected, the State anticipates that the cleanup will cost between $20-40 million. The State believes that several parties are potentially liable under CERCLA section 107. Drabbino is the current owner of a facility where there has been a release of hazardous substances. Gritter is the successor

corporation to McCabe Disposal, an operator of a hazardous waste facility at the time of disposal. Robert Klein was an operator at the time of disposal but is still serving time in the federal penitentiary and has no ability to pay any part of the State=s claim. Both the Klein Corporation and McCabe Disposal Company are defunct. The State believes that William Strassberg bears no potential liability for the landfill parcel because he acquired the property through inheritance, Ogilvie Farms is not a PRP because it is a contiguous landowner and there is insufficient evidence to pursue the City of McKinley Falls.

The State believes that its strongest case is against Gritter as a successor to McCabe Disposal. Generally, liability does not flow to a successor company in the event of an asset purchase. However, there are four exceptions to the general rule:

1. Express or implied assumption of liability
2. De facto merger
3. The purchasing corporation is a mere continuation of the seller
4. The transfer is for the fraudulent purpose of escaping liability

Louisiana Pacific Corp. v. Asarco, 909 F.2d 1260 (9th Cir. 1990); Atchison, Topeka and Santa Fe Railway vs. Brown and Bryant, 159 F.3d 358 (1998); United States v. Iron Mountain Mines, Inc. 987 F. Supp. 1233 (E.D. Cal. 1997); *IBC Manufacturing Company v. Velsicol*, 1999 U.S. App. LEXIS 15140, United States v. Davis, 261 F.3d 1 (1st Cir. 2001).

The State believes that one or more of the exceptions is applicable here. Gritter retained virtually all of McCabe=s customers. At some of the other landfill sites that Gritter acquired from McCabe, the McCabe employees were retained; at other sites that Gritter acquired from McCabe, Gritter cleaned house and brought in new personnel. The President of Gritter Corp. is
Ronald Bishlawi. Mr. Bishlawi was the Vice President of McCabe and held 50% of its stock. He owns 50% of the stock of Gritter Corporation. He is also under investigation by the Securities & Exchange Commission (SEC) for securities violations. The State also believes that in the purchase agreement, the assets of McCabe were low-balled and purchased for less than the fair market value.

The State has elected to issue a demand to the Gritter Corporation for all costs and for the cleanup. The State wants to take advantage of the joint and several aspect of the statute and pursue only one party. This approach saves the State=s limited attorney resources. Furthermore, the State believes that its best case is against Gritter because Drabbino may have a defense to liability as a Aprospective bona fide purchaser@ under the 2002 amendments to CERCLA. The State asserts that Gritter can pursue a contribution claim against Drabbino if it believes it is worth the effort.

Gritter believes it is not a successor corporation to McCabe Disposal liabilities. The transaction between the two companies was a straight asset purchase and none of the exceptions to that rule applies. Gritter believes that the case against Drabbino is at least as strong as that against Gritter and in any event it is unfair for the State to pursue Gritter alone. Gritter is willing to negotiate with the State and pay a portion of the State=s claim, but wants the State to join Drabbino in the negotiations or to pursue Drabbino directly. Gritter is also contemplating future operations in the vicinity and has an interest in appearing as a Agood corporate citizen.@

A settlement meeting to discuss resolving this matter has been arranged between the State and Gritter. Because the State is contemplating litigation against Gritter, the State should make the first settlement proposal in this round.

Round Two: Allocation Negotiation between Drabbino and Gritter

The negotiations between Gritter and the State were unsuccessful. The State brought an action for declaratory judgment on liability against both Gritter and Drabbino. The federal district court ruled in favor of the State. The

State did not include a claim for its past costs because it did not have its cost documentation in order. Therefore, if this matter is not settled, the State will have to go back to Court to seek reimbursement of its past costs, and barring an agreement regarding who will bear what portion of future cleanup costs, it would have to return to Court periodically to recover future costs. The State as well as Drabbino and Gritter want to settle this matter entirely and end the litigation.

Faced with an adjudication of liability, Drabbino and Gritter now must allocate the responsibility for the site between themselves. Representative for Drabbino and Gritter have scheduled negotiations over the appropriate allocation of site costs. They must agree to an allocation that provides the State with its $10 million in past costs and an agreement to conduct the cleanup of the site, which is estimated to cost between $20 - $40 million.

Gritter should offer the first proposal for this round of the negotiations.